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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JAMES F. GOLDSTEIN, Plaintiff and Appellant, v. BEHROOZ HAGHNAZARZADEH, Defendant and Respondent.	B219944 (Los Angeles County Super. Ct. Nos. SC082523 and SC087946)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph S. Biderman, Judge. Affirmed.

Gilchrist & Rutter, Richard H. Close and Christine A. Page for Plaintiff and Appellant.

Law Offices of Ronald M. Katzman and Ronald M. Katzman for Defendant and Respondent.

INTRODUCTION

The plaintiff extended his tropical landscaping onto one-third of the adjoining property owner-defendant's undeveloped land. After a bench trial, in balancing the parties' relative hardships, the trial court granted the plaintiff an equitable easement over the landscaping encroachment, continuing until the plaintiff's own death or until ninety days after the defendant or his successor obtains plans and all necessary building and safety and grading permits and places a commercially reasonable deposit with a licensed contractor to begin construction in good faith pursuant to a contract for a single family residence, whichever first occurs. In addition, the trial court ordered the encroaching plaintiff to pay the defendant damages in the amount of $45,000. The plaintiff appeals, claiming the trial court erred in balancing the parties' hardships as, in his view, there is no hardship to the defendant in allowing the landscaping to remain, and further, erred in awarding damages for an easement of speculative duration. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

James Goldstein filed a complaint against Bruce Juliani (formerly known as Behrooz Haghnazarzadeh), asserting causes of action to quiet title to his claim of easement by prescription, implication or estoppel; for declaratory and injunctive relief; and for a finding of good faith improver. Juliani answered and cross-complained against Goldstein for trespass. As addressed in a prior appeal, the trial court granted Goldstein's motion for summary judgment on the basis of a prescriptive easement. Under California law, however, "an exclusive prescriptive easement, 'which as a practical matter completely prohibits the true owner from using his land' . . . , will not be granted in a case (like this) involving a garden-variety residential boundary encroachment." (*Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1093.) Accordingly, we reversed the trial court's grant of summary judgment and remanded the matter which then proceeded to trial.

As set forth in the trial court's statement of decision, in addressing Goldstein's claim for equitable easement and Juliani's cross-complaint for trespass,

"1. The Court may find the existence of an easement based on the balancing of the hardships even where an easement is not found on more traditional grounds. . . . Pursuant to *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 562, the Court has considered the following factors in determining whether Goldstein should be granted an equitable easement over portions of Juliani's property for purposes of maintaining Goldstein's landscaping: (1) Goldstein must be innocent—the encroachment must not be the result of Goldstein's willful act and perhaps not the result of his negligence; (2) If Goldstein's conduct is negligent, but Juliani also contributes to the situation, then the trier of fact may proceed to weigh the hardships each may suffer and the negligence of one against the other; (3) If Juliani will suffer irreparable injury by the encroachment, the easement should be refused; and (4) the hardship to Goldstein by not allowing the easement must be greater than the hardship caused to Juliani by the continuance of the encroachment. The hardships must clearly appear in the evidence and be proved by the parties. '(Doubtful cases should be decided in favor of granting an injunction [enjoining an easement].' [(]*Christensen, supra,* 114 Cal.App.2d at p. 562.[)]

"2. The testimony and documents presented reflect that Goldstein installed landscaping on his property located at 10104 Angelo View Drive, Beverly Hills, California starting in the early 1990's and retained landscape designer Eric Nagelmann to create a tropical garden that would enhance his postmodern residence designed by famed architect John Lautner. By December 1997, the landscaping extended downhill from Goldstein's residence and an adjacent lot to the west he purchased in 1993 to the extent that the landscaping created an encroachment onto Juliani's vacant property below at 1244 Angelo Drive. The approximate extent of the encroachment by December 1997 is reflected in a survey commissioned by Juliani and prepared by Lawrence Schmahl (Exhibit 98 [sic, 76]—"the Schmahl Survey"). The landscaping encroachment at that time included trees, plants, stone pathways, and a sprinkler system. Between December 1997 and September 1998, Goldstein extended the landscaping further downhill and

added additional paths, as reflected in the survey prepared by Voorheis and Voorheis (Exhibits 25, 26).

"3. Goldstein was negligent in installing his landscaping on portions of Juliani's property. Goldstein is a sophisticated and extremely successful business person, and amassed at least some of his wealth in real estate endeavors. When it has been to his advantage, such as in his serial acquisition of neighboring properties, Goldstein demonstrated a high level of savvy in real property affairs. Goldstein's weak testimony regarding his assumption of where the property lines existed in the 1997-1998 period was not credible. However, the Court concludes that there was simply no evidence that Goldstein intentionally landscaped on Juliani's property and it would have made no economic sense for him to have done so, as the evidence presented was that Goldstein has invested approximately $385,000 in the landscaping located on Juliani's property.

"4. Juliani's conduct was negligent and partially responsible to the extent of the encroachment having occurred. Upon acquisition of the Angelo Drive property in 1997, Juliani requested and obtained the Schmahl Survey. The Schmahl Survey revealed, among other things, the presence of Goldstein's landscaping encroachment, including a stone pathway, intruding on the north area of Juliani's lot. In repeated dealings with Goldstein thereafter and for some unexplained reason, Juliani did not alert Goldstein to the survey reflecting the location of the property line. Juliani did not disclose the existence of the Schmahl Survey until after the lawsuit was filed in August 2004. In a multitude of ways, Juliani's testimony was not credible. One telling example of his failure to be forthright was Juliani's prior production in discovery of a blurry and difficult to read copy of the Schmahl Survey (Exhibit 51), wherein it is difficult to make out the reference to the landscaping encroachment in the north area of his property.

"5. The Court conducted a site visit on April 16, 2009. From that site visit it was apparent that the dramatic increase in size of the landscaped areas on Juliani's property is visible from Angelo Drive. Notwithstanding Juliani's testimony to the contrary, the Court concludes that the change in the landscaped areas after 1997 would have been apparent to Juliani. In addition, Juliani admitted at trial that he noticed a path

and palm trees in 1997 when he inspected his property. Despite this, Juliani did not place Goldstein on notice and Goldstein continued to expend large sums of money and effort on planting and maintaining the landscaped areas.

"6. With respect to the hardships, the Court has considered what hardships will be borne by Goldstein and Juliani relative to the encroachment at issue. Goldstein claims and has presented evidence that he will (1) incur approximately $135,600 in expenses to remove and transplant the now-mature trees and plants that encroach onto Juliani's property, (2) suffer permanent loss of approximately 20 percent of the exotic landscaping because it will not survive transplant due to its fragility; (3) lose the joy of experiencing the tranquil nature of his exotic landscaping to which he has become emotionally attached; (4) suffer loss of privacy; and (5) suffer an aesthetic loss to the 'tapestry' of the garden as a whole which has been featured in numerous magazines and enjoyed by architects and landscape designers throughout the world.

"7. Juliani's hardships are simple and succinct: Juliani is concerned Goldstein's encroachments will prevent Juliani from constructing his home and utilizing it to the full extent of his property for whatever legal purpose he chooses.

"8. Juliani presented evidence that he desired to construct a home (Exhibit 88), that, if built, would conflict with portions of Parcels 1 and 3 (as depicted in Exhibit 25). Juliani presented no evidence of any proposed construction in Parcel 2 as depicted in Exhibit 25. At the time of trial, the Grading Department of the Los Angeles Department of Building and Safety had rejected Juliani's most recent soils report regarding his proposed construction. Goldstein's expert, Robert Hollingsworth, opined that the current Los Angeles Building and Safety Code and applicable ordinances, including the Big Wall Ordinance, would preclude development of the single family residence proposed in Exhibit 88 and that Juliani was restricted to building at the bottom of Angelo Drive in light of the applicable code and ordinances. In light of that opinion, Goldstein withdrew his request at the end of trial for an equitable boundary exceeding the boundaries drawn by Robert Hollingsworth on Ex. 114, which indicated what Hollingsworth determined would be the perimeter of any structure that could possibly be constructed by Juliani on

his lot. Juliani submitted no expert opinion or countervailing evidence to establish his ability to build in conformity with building and grading codes.

"9. The Court makes no finding whether the landscaping encroachment would physically interfere with any future development that might be allowed in light of the applicable building code and ordinances. The Court concludes that, in the event Juliani builds a single family residence on his property, regardless of location, the hardship to him in allowing any landscaping to remain is greater than the hardship to Goldstein in requiring its removal.

"10. However, until such time (if ever) that Juliani builds a single family residence on his property, the Court concludes that there would be minimal if any hardship to Juliani if the landscaping were allowed to remain. The hardship to Goldstein, on the other hand, is significant and credible. The instant case is unique in that it goes beyond Goldstein's personal gratification. The plantings in question are extensive, exotic and rare. They form a tapestry upon which sits a home of nearly unparalleled architectural significance. Eric Engelmann's testimony establishes the significance of the juxtaposition of the landscaping and the dwelling. As a result, renowned artistic institutions and architectural societies place the Goldstein home and gardens in high regard. In addition to the expense of removal and Goldstein's significant personal enjoyment, if the Court were to refuse to grant Goldstein injunctive relief, the aesthetic and educational experiences of members of the historical, architectural and landscaping professions would be impacted.

"11. The Court has considered Juliani's argument that Goldstein's landscaping is violative of public policy in this time of water shortages and the Court takes judicial notice that the Los Angeles City Council has enacted water conservation regulations. However, there was no testimony before the Court that maintaining Goldstein's landscaping is inconsistent with applicable regulations nor that it would be impossible or impractible to conform to such.

"12. The Court grants Goldstein an equitable easement and enjoins Juliani from removing any of the plantings contained in the area delineated by Hollingsworth in Ex. 114 ('the Goldstein Equitable Easement'). The Goldstein Equitable Easement shall continue until Goldstein's death or until ninety days after Juliani or Juliani's successor in interest obtains plans, all necessary building and safety and grading permits, and places a commercially reasonable deposit with a licensed contractor to in good faith begin construction pursuant to a contract of a single family residence. . . ."

In connection with his trespass claim, Juliani had waived damages for loss of use, but pursuant to *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, Juliani is entitled to damages "measured by the diminution in value of his property as a result of the scope and duration of the Goldstein Equitable Easement. The Court concludes Juliani is entitled to damages in the amount of $85,000, reflecting the original purchase price of the total parcel of $150,000, the fact that the Goldstein Equitable Easement encompasses 1/3 of such parcel, and Goldstein's expert's opinion that the Goldstein Equitable Easement area can never be built upon. The Court notes that Juliani submitted no evidence regarding reasonable damages."

The Court rejected Goldstein's claim of prescriptive easement with respect to the pathways only as inseparable from and dependent upon the landscaping. The Court further noted "as a practical matter, there is no access to the encroachment from Juliani's property. The layout of the installed plantings prohibits Juliani from accessing the pathways. Therefore, the exclusivity in access to the planted area as well as the exclusivity in the landscaping scheme by Goldstein renders the encroachment improper to be classified as a prescriptive easement."

The Court awarded Goldstein $10,000 in damages for Juliani's prior destruction of some of the landscaping (subject to the court's prior December 2005 injunction) and ordered each party to bear his own costs in the absence of a prevailing party.

After considering Goldstein's subsequent motion for new trial, the damage award to Juliani was reduced from $85,000 to $45,000, and judgment was entered.

Goldstein appeals.

DISCUSSION

Goldstein Has Failed to Demonstrate Prejudicial Error in the Trial Court's Balancing of the Hardships in Granting Him an Equitable Easement.

Citing *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 562, as the "governing standard for addressing [his] claim for equitable easement," Goldstein acknowledges (1) he must be innocent—the encroachment must not be the result of his willful act and perhaps not the result of his negligence; (2) if his conduct is negligent, but Juliani also contributed to the situation, then the trier of fact may proceed to weigh the hardships each may suffer, and the negligence of one against the other; (3) if Juliani will suffer irreparable injury by the encroachment, the easement should be refused; and (4) *the hardship to Goldstein by not allowing the easement must be greater than the hardship caused to Juliani by the continuance of the encroachment*. Goldstein says he does not challenge the trial court's findings with respect to the first three elements and does not challenge the court's findings as to the hardship imposed on him if the easement is denied.

In Goldstein's view, however, in balancing the hardships, the trial court ignored the undisputed evidence Juliani has "no intended and/or bona fide use for the encroachment areas." Rather, Goldstein argues, (1) Juliani cannot build anywhere other than at street level so, with the adjustments he (Goldstein) proposed (in his Exhibit 114), Goldstein's landscaping would not interfere with Juliani's development; (2) most of the encroachment areas fall within rear yard and side yard setback requirements and therefore can only be used for landscaping as a practical matter, but Juliani presented no evidence he wanted to put in another type of landscaping; and (3) assuming Juliani managed to overcome the Big Wall Ordinance and prohibitive cost of building uphill, most of the landscaping would lie uphill from massive retaining walls, and Juliani presented no evidence he had the "desire or inclination to scale the precipice above his home or make any use of it."

Goldstein ignores the record as well as the standard of review. Having reviewed the record, we cannot conclude the trial court prejudicially erred in balancing the

hardships between the parties as it did. The trial court conducted a site visit and noted the considerable extent of Goldstein's encroachment—fully one-third of Juliani's property—well beyond the existing boundaries of Goldstein's parcels as well as its exclusive nature. A prescriptive easement is an inappropriate remedy in a "garden-variety residential boundary encroachment" when the encroachment effectively completely prohibits the true owner from using his land. (*Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1093.)

However, even though a person who encroaches on a residential boundary cannot establish an exclusive prescriptive easement, in ruling on an owner's request for injunctive relief, the court may refuse to enjoin the encroachment and "exercise [its] equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use." (*Hirshfield v. Schwartz*, (2001) 91 Cal.App.4th 749, 765.) The trial court balanced Goldstein's interest in preserving and enjoying his landscaping against Juliani's interest in the enjoyment of his property—not just the property on which he could build a home. The scope of an equitable easement should not be greater than is reasonably necessary to protect the encroaching party's interests. (*Christensen v. Tucker*, *supra,* 114 Cal.App.2d at pp. 562-563 [the trial court's exercise of discretion "starts with the premise that [the encroacher] is a wrongdoer and that [the encroachee's] property has been occupied"]; *Hirshfield v. Schwartz, supra,* 91 Cal.App.4th at pp. 763-764, fn. 9.) Goldstein has failed to demonstrate prejudicial error. (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 268.)

Goldstein Has Failed to Demonstrate Prejudicial Error in the Trial Court's Award of Damages.

According to Goldstein, under *Redondo Beach School Dist. v. Flodine* (1957) 153 Cal.App.2d 437, 448, the trial court erred in awarding a fixed amount of damages in connection with an easement of "wholly speculative duration." We disagree.

As Goldstein recognizes, his own testimony constituted evidence of the value of the encroachment area. The trial court noted Goldstein's landscaping occupied one-third of Juliani's property and initially awarded damages in the amount of $85,000. Later,

after Goldstein moved for a new trial on this issue, the award was reduced to $45,000. It is the trial court's province to determine the extent of damage and Goldstein has failed to demonstrate prejudicial error. (See *Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 856-857.)

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.